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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1137

LOUIS L. FRIEDMAN,

Appellant,

v.

THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

MARX LEVA
ALEXANDER B. HAWES
RICHARD SHLAKMAN
JOHN S. HOFF
815 Connecticut Ave., N.W.
Washington, D.C. 20006

RICHARD E. NOLAN
JAMES W. B. BENKARD
1 Chase Manhattan Plaza
New York, New York 10005
Counsel for Appellant

Of Counsel:

LEVA, HAWES, SYMINGTON, MARTIN & OPPENHEIMER
DAVIS POLK & WARDWELL

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Appellee's reliance (pp. 12-13) on the recent case of *Markham Advertising Co., Inc.* v. *Zahn*, 415 F.2d 772 (9th Cir.), *cert. denied*, October Term, 1969, No. 684, is misplaced. That case does not represent a ruling by this Court that a prior dismissal of an appeal for want of a substantial federal question is a determination on the merits of the federal issues involved. Rather, this Court's denial of certiorari, as has been pointed out many times, involved no expression of opinion as to the merits of the case, and therefore no expression as to the correctness of the view expressed by the Circuit Court of Appeals. We submit that the *res judicata* effect, if any, of the dismissal by this Court of an appeal "for want of a substantial federal question" is an important undecided federal issue which deserves plenary examination by the Court, especially in view of the

very serious constitutional issues which we believe are presented on this appeal.

Appellee's contention (pp. 15-16) that the procedure in the Court on the Judiciary did not differ from a routine appointment by a court of counsel for an accused is an incomplete analogy. As Judge Burke noted in the Court of Appeals:

> "I would merely note in passing that the majority's parallel to a Judge assigning counsel to represent an indigent defendant is less than accurate. The parallel would be complete if that Judge, at the time he assigned counsel, also dictated what defenses or contentions counsel was to raise in behalf of the defendant." (A22, footnote, Jurisdictional Statement)

The references by the Chief Judge of the Court on the Judiciary to the appointed attorneys as "our attorneys" and to the charges prepared by them as "our charges" raise a substantial question as to the essential fairness of the Court on the Judiciary and of its organization and procedures. The prejudicial effect of the procedural deficiencies and the vague "for cause" removal provision is aggravated by the absence of a right of appeal within the state system which could review the sufficiency of the evidence submitted and determine if it justified the drastic penalty of removal from elected office. Without such a review, fairness to the judge involved required substantial procedural safeguards which were not provided in this case.

In addition to these matters, appellee's brief contains several factual errors.

At page 19, appellee states that "[w]ithin 60 days petitioner was served with the following two additional charges . . ." referring to the charges of illegal practice of law

and violation of the state and federal tax laws. This is incorrect. Appellant was *never served* with such charges.* Proof of this fact is that, at page 20 of its brief, appellee seeks to justify Finding 3 as falling within Charge 3. This attempted justification is necessary because no charges of practicing law and income tax violation were in fact ever served. Contrary to appellee's claims at page 19 that "these additional charges were encompassed in the original Charge 3" (violation of canons of judicial ethics) it is patent that such a vague charge could not possibly and did not give notice to appellant that it included such specific matters as illegal practice of law and income tax evasion (a charge later dropped by the Court on the Judiciary). If appellee's contention is correct, appellant could have been also tried, under the same general charge of violation of the judicial canons, on any or all of the hundreds of criminal charges in the federal and state penal codes.

Appellee's further claim that appellant was not prejudiced because he could have asked for more time to prepare for trial is frivolous. His objection to the receipt of evidence on charges never made, overruled by the Court on the Judiciary, clearly preserved his rights.

Appellee contends (pp. 17-18) that there is no proof that the Court on the Judiciary ever considered the confidential report of Mr. Justice Meyer which, as later disclosed by the

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* The footnote on page 19 grossly misstates appellant's brief in the Appellate Division. It was *not* stated there that appellant was served with these additional charges on December 10, 1962. That brief stated:

> "It was on December 10, 1962, four months after the proceedings had been instituted, and only 32 days before the trial (instead of the 60 days required under the Constitution), that appellant *was advised for the first time* that evidence as to the two additional charges would be accepted by the Court, although the charges had never been made." Appellant's Brief, pp. 46-47 (emphasis added).

opinion of the Court of Appeals, ". . . served as the complaint against Appellant" (A-16). This is incredible on its face. If the Court on the Judiciary did not consider it, how could it have served as the complaint? If that Court did consider it, this was a fundamental deprivation of appellant's rights of confrontation and cross-examination. Appellee's bland statement at page 18 that "[t]he judgment of the Court was solely on the evidence presented at the trial" is wholly conclusory and cannot be accepted in the light of the disclosure that the Meyer report "served as the complaint" against appellant.

Finally, appellee errs in contending at pages 22-23 that the Court on the Judiciary was "convened" on July 18, 1962, prior to the initial session on August 15, 1962, at which time essential judges were absent. This argument is frivolous. The minutes of the Clerk of the Court on the Judiciary (Ex. 1 to Friedman affidavit of January 30, 1967) show that the "court convened" on August 15, 1962, not July 18. The letter which Chief Judge Desmond sent to the Governor and the other State officers (see exhibit attached to Ex. C to Brenner affidavit) recited in paragraph 2 thereof that

> "On *August 15, 1962*, I, as Chief Judge of the Court of Appeals, *convened* the Court on the Judiciary * * *." (emphasis supplied)

The press release issued by the Court on the Judiciary on August 15, 1962 (see press release attached to Ex. C to Brenner affidavit) read* that "Chief Judge Desmond convened the court on August 15, 1962 and the six judge body determined preliminarily * * *". Another press release issued on De-

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* The statement in this release that "the six judge body" made the determination on August 15, 1962 was erroneous, since only four judges were present that day.

cember 5, 1962 also recited that "Chief Judge Desmond on August 15, 1962, convened the Court on the Judiciary * * * ". There is no escape from the fact that the Court on the Judiciary attempted to convene on August 15, 1962, not on an earlier date as appellee contends. It was not a validly constituted court, and its actions on that date and thereafter were just as much a nullity as a conviction rendered by an improperly constituted court-martial.

CONCLUSION

Substantial and important federal questions are presented which involve not only appellant's judicial office and honor, but the rights of all elected judges to due process and equal protection of the laws. It is respectfully submitted that this Court should hear and decide these issues on the merits.

Dated: New York, N. Y.
March 4, 1970

Respectfully submitted,

MARX LEVA
ALEXANDER B. HAWES
RICHARD SHLAKMAN
JOHN S. HOFF
815 Connecticut Ave., N.W.
Washington, D.C. 20006

RICHARD E. ~~NOLAN~~
JAMES W. B. BENKARD
1 Chase Manhattan Plaza
New York, New York 10005
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